No. 44635-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; KNIGHT TRANSPORTATION, INC., an Arizona corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORT, a Washington corporation,

Respondents/Cross-Appellants

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Appellant/Cross-Respondent.

DEPARTMENT'S REPLY AND CROSS-RESPONSE BRIEF

ROBERT W. FERGUSON
Attorney General
Masako Kanazawa, WSBA #32703
Assistant Attorney General
Attorneys for Appellant
OID #91020
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7676
masakok@atg.wa.gov

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I. INTRODUCTION

On the eve of an administrative hearing to determine whether the Carriers' owner-operator drivers are employees under the Employment Security Act, the Carriers obtained *ex parte* a show cause order to enforce a disputed settlement agreement. The superior court enforced a disputed settlement agreement based solely on the attorneys' email exchange, which showed the parties were still negotiating and intended to be bound only by a final signed agreement. The superior court order is erroneous and should be reversed.

First, the court erred in exercising jurisdiction over the Carriers' claim that the Department breached its contract and demand for specific performance, based solely on a show cause motion with no action pending in the court. An *ex parte* show cause order does not constitute original process for a breach of contract action. The Carriers' concern about the pending administrative hearing does not excuse them from complying with the civil rules, which specify the manner in which actions must be commenced. Indeed, they could have sought a continuance of the administrative proceeding, which they never did. The superior court impermissibly exercised jurisdiction over the contract dispute in this case.

Second, the superior court erred in enforcing a settlement agreement that did not exist. The plain language of the Carriers'

"response" and "proposal" to the Department was a counteroffer, not an acceptance of the Department's initial offer. The attorneys' email exchange showed at most an agreement to try to reach agreement, not a binding and enforceable contract.

In their cross appeal, the Carriers argue only that the superior court should have exercised its inherent power to award fees as sanctions against the Department. However, at the superior court, they merely mentioned the court's inherent power to sanction in a footnote and did not address it at the show cause hearing. They thus have waived this issue.

Further, the Carriers do not and cannot show a clear abuse of discretion or bad faith conduct that would warrant sanctions against the Department. The tax assessments at issue in the administrative proceedings resulted from the Carriers' refusal to pay unemployment taxes for their owner-operator drivers. The Department and the Carriers have a genuine dispute over whether the taxes must be paid. Regrettably, rather than trying to resolve this dispute through the appropriate administrative process, the Carriers have consistently sidetracked the resolution of this dispute by filing motions and lawsuits. The resolution of the issues affects not only the trucking industry but also Washington workers protected by the Employment Security Act against involuntary unemployment.

The Department asks the Court to reverse the superior court, affirm the denial of attorney fees, and deny the Carriers' motion for sanctions.[1]

II. REPLY

A. The Superior Court Lacked Jurisdiction Because the Carriers Cannot Circumvent the Civil Rules by Initiating a Contract Action through an *Ex Parte* Motion for a Show Cause Order

The Carriers cite no authority that allows a party to avoid civil rules for initiating a breach of contract action by way of an *ex parte* motion for an order to show cause. There is none.

The Carriers argue that emailing the show cause order to the Department's counsel in the pending administrative proceedings provided original process for the superior court to enforce a disputed settlement agreement. Carriers Brief 31 n.31. They are wrong. A show cause order does not constitute original process for a breach of contract action.

"An order or rule to show cause is an ex parte procedure, is auxiliary by nature, and may not substitute for original process." 60 C.J.S. Motions and Orders § 22; *Vermont Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment*, 415 A.2d 188, 193 (Vt. 1980) ("order to show cause can issue only after the commencement of the action," and

[1] The Carriers erroneously argue the Department "has not raised any issue in its opening brief on the [administrative] consent order, thereby waiving it." Carriers Brief 3. To the contrary, the Department assigned error to and challenges the entry of the superior court order, which required the administrative tribunal to issue a consent order of dismissal. CP 432, ¶ 2. By challenging the entry and the merits of the superior court order, the Department challenges the entry of the consent order.

"prior to service of the complaint the court had no jurisdiction over the controversy"); *Zimmerman v. Auto Mart, Inc.*, 910 A.2d 171, 176 (Pa. Commw. Ct. 2006) (show cause order "is auxiliary in nature, based on an existing controversy, and may not substitute for original process"); *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963) (court may not enter a money judgment on a property settlement embodied in a divorce decree on a show cause motion as incident to the divorce decree).

As the Carriers note, Carriers Brief 32 n.32, the "right to initiate an original proceeding by a rule to show cause must derive from *express statutory authority*," 60 C.J.S. Motions and Orders § 22 (emphasis added). The civil rules "shall govern all civil proceedings," except where "inconsistent with rules or statutes applicable to special proceedings." CR 81(a). Subject to this limited exception, "these rules supersede all procedural statutes and other rules that may be in conflict." CR 81(b).

In determining the applicability of the civil rules under CR 81, our Supreme Court has adopted a "definition of special proceedings" that includes "only those proceedings created or completely transformed by the legislature." *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 982, 216 P.3d 374 (2009). This includes "actions *unknown to common law* (such as attachment, mandamus, or certiorari), as well as those where the legislature has exercised its police power and entirely changed the

remedies available (such as the workers' compensation system)." *Putman*, 166 Wn.2d at 982 (emphasis added). "Washington courts have identified certain actions as special proceedings, including lien foreclosures, sexually violent predator petitions, garnishment, will contests, and unlawful detainer actions." *Id.* at 981. However, no express statutory authority allows the initiation of an action to enforce a disputed contract (based in common law) by a show cause order obtained *ex parte*. As shown in the Department's opening brief, RCW 2.28.150 applies *after* the court properly obtains jurisdiction over a case and does not authorize a show cause order to serve as original process to institute a breach of contract action. The Carriers cite no authority holding otherwise.

The Carriers cite two New Jersey cases that actually disapproved of the "misused" show cause process even within a properly instituted lawsuit. Carriers Brief 32 n.32; *Solondz v. Kornmehl*, 721 A.2d 16, 18-20 (N.J. App. Div. 1998); *Ausley v. Cnty. of Middlesex*, 931 A.2d 610, 612 (N. J. App. Div. 2007). *Solondz* held that for a final determination on a breach of contract claim, the proper procedure is, "after the filing and service of the complaint, to proceed by way of motion for summary judgment." *Solondz*, 721 A.2d at 19. The summary judgment motion process affords "the party against whom such affirmative relief is sought sufficient time within which to respond." *Id.* at 19. "Courts should not

entertain and discharge an improperly brought [show cause order]." *Solondz*, 721 A.2d at 18. *Ausley* likewise disapproved the misuse of the show cause process for a final determination on the relief sought even after the plaintiff properly instituted a lawsuit with a complaint. *See Ausley*, 931 A.2d at 612 (citing *Solondz*). Here, the Carriers' misuse of the show cause process goes beyond the problems in those cases, because the Carriers never filed a complaint to initiate a civil action. Instead, they simply obtained a show cause order *ex parte*. No authority permits such a back-door attempt to obtain specific performance of a disputed contract.[2]

A show cause proceeding is limited in its scope and is ancillary to a pending action. The Carriers cite only cases where a show cause motion was raised in an existing action for a preliminary matter (not for a final determination on the relief sought) or for compliance with an already judicially adjudicated obligation. *See Rogoski v. Hammond*, 9 Wn. App. 500, 503-05, 513 P.2d 285 (1973) (show cause process was appropriate as a "preliminary" hearing in an existing rent recovery suit to determine whether the landlord's claim was "at least probably valid so as to permit the writ of attachment to issue"); *In re Petersen*, 138 Wn.2d 70, 86, 980 P.2d 1204 (1999) (addressed statutory show cause process in an existing

[2] *Ausley* addressed the merits of the parties' dispute because "the parties treated the application as one for preliminary injunctive relief and neither party briefed or argued the correct legal authority applicable to the complaint." *Ausley*, 931 A.2d at 12.

sexually violent predator action pursuant to the superior court's continuing jurisdiction under RCW 71.09.090(5) for a "threshold determination" of probable cause for a release); *Wood v. Thurston Cnty.*, 117 Wn. App. 22, 25, 68 P.3d 1084 (2003) (show cause motion filed within the public records lawsuit); *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 144, 240 P.3d 1149 (2010) (same); *Burleigh v. Johnson*, 31 Wn. App. 704, 644 P.2d 732 (1982) (wife petitioned a Minnesota court to enforce a child support order issued in a divorce action, and under the uniform reciprocal enforcement of support act, the court transferred the case to King County).

Contrary to the Carriers' claim, the civil rules for initiating a civil action by filing and serving a complaint are not simply a matter of "form over substance." Carriers Brief 30. These rules set forth the essential steps a plaintiff must follow to initiate a civil action to invoke the superior court's jurisdiction over the case *and* over the defendant. *See* CR 4; RCW 4.28.020 ("From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings."); *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585, 225 P.3d 1035

(2010) ("Proper service of process is basic to personal jurisdiction.").[3]

The Carriers claim obtaining an *ex parte* show cause order "was the *only* procedure" to determine whether there was a settlement agreement, before the administrative haring scheduled for carrier System TWT on February 20, 2013. Carriers Brief 32. They are wrong. As the Carriers acknowledge, they could have filed a complaint following the civil rules and could have then asked ALJ Gay to stay the administrative proceedings pending the superior court action. Carriers Brief 33 n.33. They also could have filed a motion to shorten time to allow a summary judgment motion to be heard on an expedited timeframe. *See, e.g., State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 236-40, 88 P.3d 375 (2004) (affirming superior court decision to shorten time to eight days between filing of the motion and the hearing). They chose not to pursue either of these options. The Carriers' unsubstantiated claim that the Department "would have opposed a stay," Carriers Brief 33 n.33, is incorrect and does not excuse their noncompliance with the civil rules.

Condon does not support the Carriers' claim that the superior court acquired, merely through an *ex parte* motion for a show cause order,

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[3] The Carriers' discussion on subject matter jurisdiction, Carriers Brief 25-26, overlooks the difference between the court's jurisdiction over a subject matter and when and how the court may appropriately exercise that jurisdiction. This case addresses the latter. Courts have distinguished jurisdiction "to adjudicate a particular controversy" (subject matter) versus over a "particular case." *E.g., Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003) (citation omitted).

"ancillary jurisdiction" to enforce a disputed settlement agreement allegedly reached in administrative proceedings. Carriers Brief 27 n.28, 33-34. *Condon* addressed the trial court's *continuing* jurisdiction over a case after dismissal "in order to protect its proceedings and vindicate its authority." *Condon v. Condon*, 177 Wn.2d 150, 158, 298 P.3d 86 (2013) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)). Here, the superior court never presided over the parties' underlying tax liability dispute. Thus, the court had no continuing or "ancillary jurisdiction" over the matter.

Additionally, the Carriers cite no case that supports their claim that the Administrative Procedure Act (APA) at RCW 34.05.510(2) gives the superior court "ancillary jurisdiction" to enforce a disputed settlement agreement outside of any pending lawsuit. The cases cited by the Carriers only discuss whether the APA or the civil rules govern a specific procedural question in a judicial review proceeding instituted under the APA. Carriers Brief 27; *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179-80, 979 P.2d 374 (1999) (time to file a cross petition for a judicial review was not an "ancillary procedural matter" subject to court rule but was governed by the APA); *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 213-17, 103 P.3d 193 (2004) (APA, not CR 4, governs the service requirement in an APA

judicial review proceeding). The Carriers did not file a petition for judicial review pursuant to the APA. They sought a show cause order *ex parte*, seeking a final determination on their *substantive* contract claim. As shown in the Department's opening brief, the APA does not provide the superior court with "ancillary jurisdiction" to determine the Carriers' contract claim based on a show cause order issued *ex parte*.

The Carriers' reliance on Missouri's writ of mandamus case is similarly misplaced. Carriers Brief 32 n.32; *Schwartz v. Jacobs*, 352 S.W.2d 389 (Mo. Ct. App. 1961). The Carriers did not seek a statutory writ of mandamus to compel performance of any act prescribed by law. *See* RCW 7.16.160; *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011) ("Mandamus is an extraordinary remedy appropriate only where a state official is under a mandatory ministerial duty to perform an act required by law as part of that official's duties."). Instead, the Carriers sought enforcement of a disputed settlement agreement. Also, *Schwartz* held only that *the plaintiff* may not challenge the sufficiency of the service of process, because the service of process "is to give the court jurisdiction over the person of a *defendant*" and "is not required for the protection of *the plaintiff*." *Schwartz*, 352 S.W.2d at 393 (emphasis added).

The Carriers argue the Department received due process because it received a notice (show cause order) and an opportunity to show cause

why a disputed settlement agreement should not be enforced. Carriers 30-31, n.30. However, due process "requires that a defendant be given notice of the suit and be subject to the personal jurisdiction of the court." *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 70, 684 P.2d 752 (1984) (citations omitted). "Proper service of process is basic to personal jurisdiction." *Ralph's Concrete*, 152 Wn. App. at 585; *see also Landreville v. Shoreline Cnty. Coll. Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988) (service of process not in compliance with RCW 4.92.020 mandated dismissal, and any "hardship engendered by this exclusive method of service is a matter for the legislature, not for this court, which must enforce the law as it is plainly written").[4]

The superior court lacked personal jurisdiction over the Department because the Carriers did not serve any complaint or summons in compliance with the civil rules, and a show cause order does not constitute original process. Further, the superior court impermissibly exercised its jurisdiction over a contract dispute with no action pending in the court. To conclude otherwise would encourage violations of the civil

[4] The truncated show cause process also deprived the Department of due process accorded by the common law of this state establishing the requisite burden of proof. Under the common law, a party seeking specific performance of a contract bears a heightened burden of proof: "clear and unequivocal" evidence that leaves no doubt as to the terms, character, and existence of the contract. *Powers v. Hastings*, 93 Wn.2d 709, 713-17, 612 P.2d 371 (1980). By using the show cause process, the court incorrectly placed the burden of proof on the Department to show that no contract existed.

rules by allowing plaintiffs to obtain an order *ex parte* to require defendants to appear within a short time to show cause why requested relief should not be granted. The law does not allow such practice.

The superior court erred in enforcing a disputed settlement agreement based solely on a show cause motion with no action pending in the court. The Court should thus reverse the superior court.

B. The Attorneys' Email Exchange Did Not Constitute a Binding Settlement Agreement

The superior court erred in enforcing a disputed settlement agreement based solely on the attorneys' email exchange, which showed there was no meeting of the minds or intent to be bound before executing a formal agreement. The Carriers' contrary argument lacks merit.

1. The findings of fact in the superior order enforcing a disputed settlement agreement are superfluous because this Court reviews the order de novo

At the outset, the Carriers claim the superior "court's findings of fact are verities on appeal, supported by substantial evidence, and unobjected by" the Department. Carriers Brief 24, 2. They are wrong.

The Department assigned error to the superior court's entry of the order on appeal as well as the superior court's specific findings. Appellant's Brief 2 (Assignment of Errors 3). In any event, no assignment of error is required for those findings because this Court engages in a de

novo review, applying the summary judgment standards. *See Condon v. Condon*, 177 Wn.2d at 161 n.4, 162 ("summary judgment procedures are used in motions to enforce a settlement agreement"). Under the summary judgment procedures, the "parties' submissions must be read in the light most favorable to the nonmoving party in order to determine whether reasonable minds could reach only one conclusion." *Id.* at 162.

The summary judgment proceeding only determines "whether a genuine issue of material fact exists," and the "findings of fact and conclusions of law," if entered, "are superfluous and may not be considered." *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978). "A litigant need not assign error to superfluous findings." *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (partial summary judgment order).

This Court reviews the superior court order enforcing a disputed settlement agreement de novo with no consideration given to the superior court's findings of fact or conclusions of law. The Carriers cite no authority holding otherwise. Their reference to the substantial evidence standard of review is inconsistent not only with the established precedent but with their own concession "that the standard of review with respect to the trial court's final determination is de novo." Carriers Brief 24.

2. The attorneys' email exchange showed no meeting of the minds or intent to be bound before formal execution

This case epitomizes why CR 2A and RCW 2.44.010 exist and why Washington does not recognize the enforceability of an agreement to agree. Although settlements are encouraged, the rule and the statute are designed to avoid disputes over settlements and "give certainty and finality to settlements and compromises, if they are made." *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954). They ensure "negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one." *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993).

Washington has a policy "to promote freedom of communication in compromise negotiations" as reflected in ER 408, so the parties may negotiate settlement without fear their communications may be used against them in case the negotiation breaks down. *Bros. v. Pub. Sch. Emps. of Wash.*, 88 Wn. App. 398, 406, 945 P.2d 208 (1997). An "agreement to agree" is unenforceable because parties should not be trapped "in surprise contractual obligations." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76, 178, 94 P.3d 945 (2004).

It was the Carriers' burden to prove, as a matter of law, that "all of the provisions of the agreement were set out in the writings" *and* that "the

parties intended a binding agreement prior to the time of the signing and delivery of a formal contract." *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 475-76, 149 P.3d 691 (2006) (citation omitted). "If the preliminary agreement is incomplete" or "if an intention is manifested in *any way* that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract." *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 521, 408 P.2d 382 (1965) (emphasis added). The Carriers had to prove as a matter of law they *unequivocally* accepted a settlement offer. *See Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

Here, the attorneys' emails, especially when viewed in the light most favorable to the Department, did not establish the parties' meeting of the minds or intent to be bound before formal execution. First, assistant attorney general Marc Worthy's September 26 email did not set forth all necessary terms for a binding settlement because it contained no term to explain *how* the Carriers would "stipulate to liability," agree the tax assessments be "affirmed," and "drop" their administrative appeals while still being free "to pursue whatever legal issues they want in superior court." CP 78. Rather, the September 26 email contemplated further negotiation to make the proposed settlement complete and thus invited an

"agreement to agree." *Keystone*, 152 Wn.2d at 175-76.[5]

More importantly, the plain language of Tom Fitzpatrick's October 8 letter, CP 81-82, was a counteroffer, not an unequivocal acceptance of the Department's offer. Fitzpatrick, an experienced litigator, carefully described the letter as a "response" and "proposal from the carriers to resolve the cases," not as an "acceptance." CP 81. In fact, the letter proposed new terms modifying the September 26 offer and called for the Department's acceptance. CP 82 ("*If this is acceptable to your client*, please advise me as soon as possible so that we can advise Judge Gay and bring the numbered cases to resolution."). Further, the letter expressly excluded one carrier (Eagle), CP 81, and proposed different terms for another (Hawkings), CP 82. Although the Carriers note Hawkings was not a trucking carrier, it

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[5] The Carriers claim the parties "plainly agreed that the Carriers could pursue whatever legal issues they wanted." Carriers Brief 15 n.19. But the parties continued to negotiate what legal issues the Carriers could raise in court. For example, Worthy explained in his October 16 email, responding to Fitzpatrick's October 8 email, that he understood "whatever legal issues" to mean preemption issue:

> I understand that your client wants to keep the right to go forward on pre-emption and my client [sic] willing to agree that but, in our view, the agreement should be written in the positive rather than the negative. That is, that the purpose of the agreement is for all parties to agree that if there is no preemption then drivers are employees, but resolution of the preemption issue is outside scope of OAH, yet the Superior court cannot hear until administrative remedies exhausted, etc. Can we agree to something along these lines? If so, can you send me a short draft and we can work on it together?

CP 85 (emphasis added). Attorney Fitzpatrick responded by saying, "I think so Marc," while expressing a concern only on the Commissioner review process, not on the scope of the legal issues the Carriers could pursue on appeal. CP 85. The parties' later drafts and emails further addressed and qualified this issue. CP 92 ¶ 7(1)(b), 98, 101 ¶ 7(1)(b), 107.

was one of the eight companies included in the administrative proceedings and Worthy's September 26 email, which stated the Department was most interested "in having all of your clients settle at the OAH level." CP 78.

The October 8 letter was not an acceptance. It was a counteroffer. The Carriers make conclusory assertions but offer no evidence or persuasive argument supporting their assertions. Because the Carriers did not establish the parties' meeting of the minds, there was not an enforceable settlement agreement. The superior court erred in finding and enforcing a disputed settlement agreement based solely on the attorneys' email exchange.

Again, the Carriers' reliance on *Condon* is misplaced. Carriers Brief 38-39. *Condon* reversed the trial court's enforcement of disputed terms allegedly implied in a settlement agreement that had been entered in open court, because such terms "must be expressly stated and not implied." *Condon*, 177 Wn.2d at 163-64. *Condon* involved an interpretation of a settlement agreement, the existence of which was not at issue. *Condon* does not support enforcement of a disputed settlement agreement based on attorneys' emails that do not show a meeting of the minds.

Further, the superior court erred in enforcing a settlement agreement because the Carriers did not show the parties intended to be bound by the September 26 and October 8 emails before signing a formal agreement. The Carriers argue "a formal written agreement of the parties

is unnecessary where a contract has been formed orally or by exchanges of writings, unless the parties expressly condition the settlement on such formal writing." Carriers Brief 42. They are wrong.

First, oral settlement negotiations are unenforceable, and the Carriers' reliance on *Stottlemyre v. Reed*, 35 Wn. App. 169, 665 P.2d 1383 (1983), for a contrary proposition is misplaced. *Stottlemyre* upheld the enforcement of a settlement agreement under RCW 2.44.010(1), because the counsel for the party to be bound acknowledged *in open court on the record* the existence and terms of the settlement agreement. *Stottlemyre*, 35 Wn. App. at 172-73; *Ferree*, 71 Wn. App. at 42 n.8 (Stottlemyre's attorney "squarely acknowledged the existence and terms of the settlement agreement were not genuinely disputed"). For a court to enforce a settlement agreement, CR 2A and RCW 2.44.010 require the agreement be made in open court or in writing and subscribed by the party or its attorney to be bound. Noncompliance with the rule and statute "leaves the court with no alternative." *Eddleman*, 45 Wn.2d at 432. Noncompliance "dictates that the agreement is unenforceable." *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992).

Second, absence of express reservation of right not to be bound does not preclude a finding that the parties did not intend to be bound before executing a formal agreement. *Zucker v. Katz*, 836 F. Supp. 137,

144 (S.D.N.Y. 1993). For example, the federal district court in New York identified four *non-dispositive* factors in determining whether parties intended to be bound before formal execution. These factors are whether:

> (1) either party has expressly reserved the right not to be bound absent a written agreement;
> (2) there has been partial performance of the contract;
> (3) all of the terms of the alleged contract have been agreed upon such that there is literally nothing left to negotiate or settle; and
> (4) the agreement at issue is the type of contract that is generally committed to writing.

Zucker, 836 F. Supp. at 144 (citation omitted). No single factor is dispositive. *Zucker*, 836 F. Supp. at 144. The court concluded that *although neither party expressly reserved the right not to be bound*, other factors, including the language of settlement drafts, showed "no genuine issue of fact that the parties intended to be bound *by a signed, written agreement*." *Id.* at 144-50 (emphasis added). Thus, the court declined to enforce a disputed settlement agreement. *Id.*

Here, as in *Zucker*, the language of the attorneys' settlement agreement drafts exchanged after the October 8 email shows the parties were still negotiating and intended to be bound only upon signing a final agreement. The draft said: "This Agreement will become operative *as of the date of the last signature affixed herein*." CP 91 (emphasis added). "*By signing this Agreement*," the parties would "voluntarily accept it." CP

95 (emphasis added). "*Upon mutual execution*, the Carriers' administrative appeals will be dismissed." CP 95 (emphasis added). "No modification of this Agreement shall be binding upon them *unless made in writing and signed by both.*" CP 93 (emphasis added). "The terms of this Agreement constitute the *entire agreement* between [the Department] and the Carriers regarding the subject matter described herein." CP 93 (emphasis added). During the negotiation, neither party objected to any of these provisions. CP 90-111. These terms show the parties intended to be bound only upon formal execution.

Moreover, there was no partial performance, and the parties continued to discuss terms such as the availability of review by the Commissioner of the Department and what legal issues the Carriers could raise in court. CP 85-113. The negotiated settlement, which sought to define the parties' rights and liabilities in *continuing* litigation, is a type of agreement attorneys would commit to a formal writing, especially in light of CR 2A and RCW 2.44.010. Thus, the analysis of the *Zucker* factors confirms the parties' intent to be bound only *by a signed agreement.*

Morris does not support a contrary conclusion. As explained in the Department's opening brief, *Morris* involved a clear showing of intent to be bound, and the client to be bound signed a letter confirming the existence of a settlement agreement. Appellant's Brief 33; *Morris v.*

Maks, 69 Wn. App. 865, 870-71, 850 P.2d 1357 (1993); *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 479, 149 P.3d 691 (2006) ("The intention to be bound by the settlement was clear in the letters in *Morris*."); *Evans*, 136 Wn. App. at 478 ("Moreover, in *Morris*, the client himself signed a letter confirming a settlement."). Unlike the situation in *Morris*, no communication by the Department or its attorney acknowledged the existence of any settlement agreement.

The superior court erred in enforcing a settlement agreement that does not exist. The Court should reverse the superior court.[6]

III. RESPONSE TO CROSS APPEAL

In their cross appeal, the Carriers argue only that the superior court should have exercised its inherent power to award attorney fees as sanctions against the Department. Carriers Brief 3 (Assignment of Error

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[6] The Carriers claim the "sole issue of ultimate disagreement was the scope of the legal issues on which the Carriers could seek judicial review." Carriers Brief 41. However, the settlement negotiation broke down due to the lack of finality on the remaining questions of fact. CP 113. ALJ Gay denied the Carriers' summary judgment motion because there were genuine issues of material fact. CP 180-81. The Department sought to obtain factual resolution at the administrative proceedings, from which either aggrieved party may pursue judicial review.

The Carriers also claim the Department waived the argument that the alleged settlement agreement is invalid because it presents no final agency order for judicial review. Carriers Brief 4 n.2. The Department raised this argument in conjunction with its request for a stay to demonstrate the harm resulting from the superior court order under RAP 8.1(b)(3). Contrary to the Carriers' mischaracterization, the Department did not waive this argument when the Department's counsel only acknowledged *what Judge Rumbaugh ruled* during the presentment hearing to confirm the judge's rulings. Carriers Brief 4 n.2. Acknowledging what the superior court ruled does not constitute acknowledging the rulings are correct. The Carriers' contrary argument lacks merit.

1), 46-50. The Carriers claim the Department engaged in bad faith conduct by "dragging out" the administrative proceedings "for nearly three years" and "attempting to repudiate" the disputed settlement. Carriers Brief 48. The Carriers' cross appeal fails for several reasons.[7]

First, the Carriers waived their inherent power argument by not properly raising and preserving it at the superior court. Second, and more importantly, the Carriers make no clear showing of abuse in the superior court's discretionary decision not to award attorney fees as sanctions. "An award of attorney fees is left to the trial court's discretion and will not be disturbed absent *a clear showing* of abuse." *In re Pearsall-Stipek*, 136 Wn.2d 255, 265, 961 P.2d 343 (1998) (emphasis added)

A. Counterstatement of the Issues

1. Did the Carriers waive their right to appeal the superior court's denial of sanctions when they only mentioned the court's inherent power to sanction in a footnote in their superior court brief and did not address it during the show cause hearing, and, as a result, the superior court made no finding about bad faith conduct?

2. Did the superior court abuse its discretion in denying sanctions when the Carriers were unable to establish bad faith conduct by the Department?

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[7] The Carriers do not assign error to or challenge the superior court's discretionary denial of contempt. Carriers Brief 3; *State v. Johnson*, 146 Wn. App. 395, 401, 190 P.3d 516 (2008) ("We will not disturb a trial court's contempt ruling absent an abuse of that discretion"). The Carriers have thus waived this issue.

B. The Carriers Waived the Issue of Sanctions by Inadequately Raising and Preserving the Issue Below

The Court should reject the Carriers' cross appeal because they did not adequately raise and preserve their request for the exercise of inherent power to sanction, the only issue they raise in their cross appeal. The Carriers thus waived the issue.

Below, the Carriers filed a show cause motion to (1) enforce a disputed settlement agreement or, in the alternative, (2) find the Department and its counsel in contempt of ALJ Gay's remand order under RCW 7.21.010(1)(b). CP 24-42. The Carriers addressed the court's inherent power to impose sanctions *only in a footnote* in their brief submitted to the superior court. CP 38 n.7. At no point during the show cause hearing did the Carriers address the inherent power to sanction. The Carriers may not cross appeal based solely on an issue they only raised in passing at the superior court. *See Wash. Fed'n of State Emps., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 162-63, 849 P.2d 1201 (1993) (failure to adequately raise an issue at trial court precluded appellate review); *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) ("[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

Further, the Carriers' cross appeal on the inherent power theory is

particularly problematic because, for the exercise of inherent power, the superior court had to find "some conduct equivalent to bad faith." *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 (2012). No such finding was made. The Court should thus deny the Carriers' cross appeal.

C. The Carriers Fail to Show the Superior Court Clearly Abused Its Discretion in Not Exercising Its Inherent Power to Sanction

Even if the Carriers preserved their request for attorney fees under the inherent power theory, they fail to make a clear showing that the superior court abused its discretion in denying their request.

"Attorney fees will not be awarded as part of the cost of litigation in absence of a contract, statute, or a recognized ground in equity." *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, 280 P.3d 1133, *review denied*, 175 Wn.2d 1028 (2012). Although the court has "inherent equitable powers" to assess attorney fees as sanctions for bad faith conduct, such powers exist only in "narrowly defined circumstances" and "must be exercised with restraint and discretion." *Greenbank*, 168 Wn. App. at 525 (citation omitted). A "court may resort to its inherent powers only to protect the judicial branch in the performance of its constitutional duties, when reasonably necessary for the efficient administration of justice." *Id.* (citations omitted).

There are three types of bad faith conduct that can justify the

court's exercise of inherent power to award attorney fees: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 784, 275 P.3d 339 (2012). "Prelitigation misconduct refers to obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right." *Wright*, 167 Wn. App. at 784 (citation omitted). "Procedural bad-faith is unrelated to the merits of the case and refers to vexatious conduct during the course of litigation, such as delaying or disrupting proceedings." *Id.* (citation omitted). "Substantive bad faith occurs when a party intentionally brings a frivolous claim, counterclaim, or defense *with improper motive*." *Id.* (emphasis in original) (citation omitted).

Here, the Carriers alleged only prelitigation misconduct. They claimed the Department engaged in dilatory conduct during the administrative proceedings and repudiated the disputed settlement, both of which allegedly occurred *before* the superior court show cause proceeding. Carriers Brief 48. The Carriers may not allege procedural bad faith based on conduct that did not occur at the superior court to trigger that court's inherent power to manage its own proceedings. *See State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (inherent power to sanction procedural bad faith is governed by "the control necessarily vested in courts to manage their own affairs" to achieve an orderly and expeditious process).

Any procedural irregularity during the administrative proceedings was to be addressed by the presiding administrative law judge. *See* WAC 10-08-200(4), (11) (presiding officer has authority to "rule on procedural matters" and "regulate the course of the hearing and take any appropriate action necessary to maintain order during the hearing").[8]

Prelitigation bad faith may not be based on conduct that is the basis for the particular litigation. *Greenbank*, 168 Wn. App. at 527 (landowners' violation of covenant, which was the basis of homeowner associations' lawsuit, may not be the basis for prelitigation bad faith); *Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994) ("bad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees"). This is because a "litigant has the right to go to court and litigate a nonfrivolous claim or defense." *Greenbank*, 168 Wn. App. at 527. "To allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees." *Id.* (quoting *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1231 (6th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985)).

Further, preligiation misconduct, "to be sanctionable by an order to

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[8] In any event, the Carriers present no dilatory or "vexatious" conduct during the administrative proceedings that would warrant sanctions against the Department. Contrary to the Carriers' claim and as discussed below, the Department did not engage in any dilatory conduct.

pay the other party's attorney fees, necessarily involves some disregard of judicial authority." *Greenbank*, 168 Wn. App. at 526 (citations omitted). This is because prelitigation misconduct is "obdurate or obstinate conduct that necessitates legal action to enforce *a clearly valid claim or right*." *Wright*, 167 Wn. App. at 784 (emphasis omitted). In this sense, the "analogy to contempt is instructive." *Id.*; *see also Smith v. Whatcom Cnty. Dist. Ct.*, 147 Wn.2d 98, 105, 52 P.3d 485 (2002) (primary purpose of civil contempt is "to coerce a party to comply with an order or judgment," not to punish for noncompliance); *State v. Norland*, 31 Wn. App. 725, 729, 644 P.2d 724 (1982) (Contempt "power is to be exercised with caution, and within narrow limits").

For example, this Court has held a trial court abused its discretion in imposing attorney fees against defendants for conduct at issue in the lawsuit, because the defendants "did not disobey the court or thwart its authority" and thus "did not disregard judicial authority." *Greenbank*, 168 Wn. App. at 527-28. Until they lost in the lawsuit, "there had been no judicial ruling establishing that [plaintiffs] were clearly in the right." *Id.* at 527. Under such circumstances, the fee award "was not a proper exercise of the inherent power to award attorney fees for bad faith." *Id.* at 528.

The same principle applies here. The Carriers may not establish bad faith conduct based on the Department's alleged repudiation of a

disputed settlement, which was the very basis for the show cause proceeding. In addition, until the superior court granted the Carriers' motion to enforce, there had been no judicial determination clearly establishing that an enforceable settlement agreement existed. Thus, it would have been an abuse of discretion for the superior court to find bad faith based on the Department's alleged repudiation of the disputed settlement. *See Greenbank*, 168 Wn. App. at 524-28.

Further, contrary to the Carriers' claim, the Department did not "drag out" the administrative proceedings. CP 169 ¶ 11 (Worthy declaration); CP 222 ¶ 17 (Lagerberg declaration). To the contrary, it was the Carriers who delayed these proceedings by filing an unsuccessful lawsuit in federal court in July 2011 against various Department employees and their spouses under 42 U.S.C. § 1983 and in tort, challenging the very tax assessments at issue in the administrative proceedings. CP 168 ¶ 6; CP 190-207.

In granting the defendants' motion to dismiss in February 2012, the federal court expressly pointed out the pending administrative proceedings, with the availability of judicial review, were the proper forum for the Carriers to challenge the tax assessments. *Wash. Trucking Ass'n v. Trause*, U.S. District Court, No. C11-1223-RSM, 2012 WL 585077, at *4 (W.D. Wash. Feb. 21, 2012) (not reported); CP 168 ¶ 7; CP

215-16. The federal court also chastised the Carriers for their deceptive discussion of federal case law. *Trause*, 2012 WL 585077, at * 3 n.3; CP 214.[9] After the federal lawsuit was dismissed, the parties *voluntarily* engaged in settlement negotiations, and ALJ Gay continued the proceedings *at the parties' joint request*. CP 168 ¶ 8. At no time did ALJ Gay find any bad faith conduct by the Department. There was none.[10]

Nor is there any merit to the Carriers' claim that the Department did not comply with ALJ Gay's April 2011 remand order. The remand resulted after the Carriers argued that the amounts of the tax assessments were incorrect. The remand order imposed duties on both the Department and the Carriers, where the Carriers were to produce additional information for the Department to consider. CP 185-88. The ALJ stated

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[9] Judge Ricardo Martinez stated that the Carriers' "paraphrase of [a federal case] has deceptively excised the critical word 'benefits' from the Supreme Court statement, completely changing its meaning." *Trause*, 2012 WL 585077, at * 3 n.3; CP 214.

[10] Despite the federal court's dismissal of their first suit, the Carriers and Washington Trucking Association recently filed another lawsuit under 42 U.S.C. § 1983 and in tort in May 2013, this time in Spokane County Superior Court, against the Department and several former and current employees and their spouses based on the same tax assessments. *Wash. Trucking Ass'n v. Emp't Sec. Dep't*, Spokane County Superior Court, No. 13-2-01779-7. When the Department and other individual defendants filed a motion to transfer venue to Thurston County pursuant to RCW 4.12.020(2) and .030(3), plaintiffs Carriers and the Trucking Association filed a motion for sanctions, claiming the Department filed the motion in bad faith. The Spokane County Superior Court rejected their argument, granted the defendants' motion, and transferred the case to Thurston County.

The Carriers falsely suggest the Department delayed the entry of the consent order of dismissal. Carriers Brief 22. However, in accordance with the terms of Judge Rumbaugh's order, the Department timely filed an objection to the Carriers' proposed order within five judicial days of the Carriers' submitting their order to the ALJ. CP 432; Lagerberg Decl. ¶¶ 20, 21 (attached).

the Department "should not be expected to" make these redeterminations on its own, but "the burden should be on [the Carriers] to provide [necessary] information with some evidentiary support." CP 186-87. However, they did not provide all of the necessary information to the Department.[11]

The Carriers argue it is the Department's "objective to eliminate the use of the owner/operators in the trucking industry affects the routes, prices, and services of trucking firms and is preempted by federal law." Carriers Brief 9 n.9. However, the Carriers address only their business interests, not the Employment Security Act's express intent to protect unemployed workers. *See* RCW 50.01.010. "The purpose of unemployment compensation is to reduce involuntary unemployment and ease the suffering caused thereby." *W. Ports*, 110 Wn. App. at 450. The Department has a statutory duty to administer the act. RCW 50.12.010. Neither the Department's diligence in ensuring coverage for all Washington employees nor the presence of a genuine dispute over whether

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[11] In order to find any of the Carriers' owner-operator drivers exempt from the "exceedingly broad" coverage of the Employment Security Act, the Carriers had to prove each one of the elements in RCW 50.04.140. *W. Ports Transp. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 457-58, 41 P.3d 510 (2002) (owner-operator driver was an employee of the trucking carrier). Although the Carriers claimed some of their owner-operator drivers held a unified business identifier (UBI) number, having a UBI number is but one of the six elements for the exemption under subsection (2). RCW 50.04.140(2)(e).

As shown in the declaration of assistant attorney general Marc Worthy submitted in conjunction with the Department's motion to modify the ruling denying stay (attached), the Carriers did not provide complete documentation after the remand, necessitating further in-depth research by the Department. Worthy Decl. ¶ 18. Finally, in an effort to expedite resolution of these administrative cases, the Department simply accepted reduced assessments proposed by the Carriers. Worthy Decl. ¶ 16.

the Carriers must pay unemployment taxes for their owner-operator drivers translates to bad faith by the Department.[12]

In sum, the Carriers present no clear showing of an abuse of discretion in the superior court's denying their request for attorney fees as sanctions against the Department. The Court should affirm the superior court's discretionary denial of attorney fees. None of the cases relied on by the Carriers requires a contrary result.[13]

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[12] Although the question of whether the Carriers must pay unemployment taxes is irrelevant to the present appeal, the Department briefly point out that the Carriers are incorrect in claiming *Penick* held owner-operator drivers were exempt under the Employment Security Act. Carriers Brief 5 n.4. Rather, *Penick* held only that the truck driver there was a covered employee and simply noted the Department Commissioner's unchallenged decision that the employer's owner-operator drivers were exempt. *See Penick v. Emp't Sec. Dep't*, 82 Wn. App. 30, 39, 917 P.2d 136 (1996). As this Court later explained, "the *Penick* court never reached the issue of whether owner/operators (like Mr. Marshall) might also be eligible for benefits." *W. Ports*, 110 Wn. App. at 453. "For whatever reason the Commissioner may have found the owner/operators exempt in that case, nothing in the language of RCW 50.04.100 or *Penick* suggests that truck ownership per se disqualifies a driver from receiving benefits." *Id. Western Ports* held the owner-operator driver was a covered employee. *Id.* at 450-58.

Also, the Carriers' reliance on cases interpreting a specific exemption under the Industrial Insurance Act is misleading. Carriers Brief 5 n.4; RCW 51.08.180 ("a person is not a worker for the purpose of this title, with respect to his or her activities attendant to operating a truck which he or she owns, and which is leased to a common or contract carrier"). Such an exemption is absent in the Employment Security Act, Title 50 RCW.

[13] *See Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-30, 982 P.2d 131 (1999) (trial court abused discretion in awarding fees); *Miotke v. City of Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984) ("There is no bad faith sufficient to justify an award of fees."); *In re Pearsall-Stipek*, 141 Wn.2d 756, 783-84, 10 P.3d 1034 (2000) (recall petition was not subject to sanctions because there was no showing it was "intentionally frivolous . . . brought for the purpose of harassment"); *In re Lindquist*, 172 Wn.2d 120, 136-39, 258 P.3d 9 (2011) (no abuse of discretion in the award of fees as sanctions when an "intentionally frivolous recall petition" was brought against a prosecuting attorney on the eve of an election clearly for political harassment); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) (no abuse of discretion in the award of fees as sanctions based on a party's "relentless, repeated fraudulent and brazenly unethical efforts"); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975) (abuse of discretion

IV. RESPONSE TO REQUEST FOR SANCTIONS

Citing RAP 18.7 and 18.9, the Carriers seek sanctions, claiming the Department's appeal is frivolous and taken for purposes of delay. Carriers Brief 50-53. The Carriers' request for sanctions lacks merit.

An appellate court may award attorney fees as sanctions when a party uses the rules of appellate procedure for the purpose of delay, files a frivolous appeal, or fails to comply with the rules. RAP 18.9; *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010) (abuse of discretion in awarding fees under RAP 18.9). "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents *no debatable issues* upon which reasonable minds might differ, *and* that the appeal is *so devoid of merit* that there is *no possibility of reversal*." *Advocates*, 170 Wn.2d at 580 (citation omitted). "All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." *Id.* (citation omitted).

As Commissioner Schmidt of this Court concluded in his ruling

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in awarding fees as sanctions); *In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986) (no abuse of discretion in awarding fees as sanctions when attorney admitted having repeatedly filed objections for the sole purpose of exacting fee concessions in connection with other litigation); *Lawson v. Brown's Home Day Care Ctr., Inc.*, 861 A.2d 1048, 1053-54 (Vt. 2004) (finding of bad faith was not "clearly erroneous" when attorney intentionally violated a confidentiality agreement by filing unsealed documents and accused the opposing counsel of unethical and illegal conduct); *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 559, 560 (S.D. Ohio 1987) (trial court decision awarding sanctions when client "unreasonably and vexatiously" refused to sign a settlement agreement that had been read into the record in open court with the approval of both parties' counsel).

denying a stay, the Department's appeal presents "debatable legal issues." Ruling Denying Stay 6. As both parties agree, this appeal presents questions of law subject to de novo review, with no deference given to the superior court decision. *See Condon*, 177 Wn.2d at 157, 161 n.4, 162; Carriers Brief 24. As shown in the Department's opening and reply briefs, the Department's appeal has merit. It is not frivolous.

The Court should reject the Carriers' unsupported allegation that the Department filed this appeal "solely to obtain delay in the judicial review of its assessments against the Carriers." Carriers Brief 52. The Department filed this appeal because the superior court decision is erroneous and should be reversed, and the Department has the right to appeal the decision. *See* RAP 2.2(a); *Greenbank*, 168 Wn. App. at 527 (party has the right to litigate a nonfrivolous claim or defense).

The Department seeks expeditious resolution of this appeal and thus on the underlying tax assessments. The Department filed this appeal on March 15, 2013, nine days after the superior court issued its order on March 6. Then, within five days, the Department filed a motion for stay on March 20. Within a week after Commissioner Schmidt issued a ruling denying stay on May 8, the Department filed a motion to modify that ruling and a motion for accelerated review on May 15. The Department filed its opening brief on the merits on May 14, more than a month in

advance of its deadline. The Department never sought any extension of the time to file any required documents in this appeal.

The Carriers claim the Department's "motions practice in the trial court and before this Court" manifests the Department's "true intent of delay." Carriers Brief 53. The Carriers are wrong. First, the Department never filed any motion in the superior court below. Second, none of the three motions the Department filed with this Court was advanced for the purpose of improper delay. The Department filed a motion for stay, a motion to modify the ruling denying stay, and a motion for accelerated review pursuant to the rules of appellate procedure based on legitimate and well-founded considerations of judicial economy.

Without a stay, the Carriers' petition for judicial review based on the superior court order has proceeded in Spokane County Superior Court, and any efforts and expenditures made by the parties and the court in that proceeding will have been a waste if the Department prevails in this appeal. The Department asked this Court to accelerate the disposition of this appeal, so the parties would know as soon as possible whether the Spokane County judicial review action should proceed and thus minimize any potential waste of resources. Throughout, the Department has sought

expeditious resolution of these issues.[14]

In sum, the Department's appeal is not frivolous and was not filed for the purpose of delay. There is no basis for sanctions. None of the cases relied on by the Carriers supports imposition of sanctions against the Department or its counsel in this case.[15]

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[14] As of the writing of this brief, this Court has yet to issue a ruling on the motion to modify or motion for accelerated review.

In their June 21 and July 2, 2013, letters to this Court, the Carriers referenced the Department's motion to continue filed in Spokane County Superior Court in the Carriers' judicial review action, which is based on the Pierce County Superior Court order on appeal. The Department asked Spokane County Superior Court to continue the proceeding *until this Court determines the pending motion to modify the ruling denying stay*. The superior court denied the motion but also denied the Carriers' motion for sanctions under CR 11, stating, "Filing said motion is not without a basis, nor is it for an improper purpose." After the superior court denied that motion, the Department promptly filed its brief on the merits in that proceeding by the deadline, and the court heard the parties' oral argument on July 26, 2013 and took the matter under advisement.

[15] *See Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980) (appeal was frivolous and brought for delay when it was "essentially a factual appeal and [was] totally devoid of merit"); *Millers Cas. Ins. Co., of Texas v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983) (appeal was frivolous when it "presented no debatable issues" and had "no merit whatsoever" and the "authorities, within and without this state, clearly dictated the trial court be affirmed"); *Boyles v. Dep't of Ret. Sys.*, 105 Wn.2d 499, 507-08, 716 P.2d 869 (1986) (appeal was frivolous when appellant "would not accept" the Supreme Court's prior decision and, even if there was any ambiguity in that decision, uncontradicted evidence dictated the trial court decision); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 692, 732 P.2d 510 (1987) (appeal was frivolous when appellant raised "essentially a factual question that has been settled" by the narrative report of proceedings and presented "no basis" to disregard the APA rule-making requirements); *Layne v. Hyde*, 54 Wn. App. 125, 135-36, 773 P.2d 83 (1989) (no abuse of discretion in the award of fees as sanctions where the action alleging, among other things, conspiracy against an administrative law judge and unemployment compensation claimant's counsel was frivolous under the settled law); *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (losing judicial election candidate's lack of standing in filing a private quo warranto action against election winner with knowledge the filing was premature justified sanctions, and his continuing meritless appeal was frivolous); *In re Adoption of B.T.*, 150 Wn.2d 409, 421, 78 P.3d 634 (2003) (upheld the denial of sanctions because the challenged conduct, while "misguided," was "not so egregious as to dictate an award of attorney fees"); *Rich v. Starczewski*, 29 Wn. App. 244, 247-50, 628 P.2d 831 (1981) (sanctions justified where pro se appellant filed "plethora of motions,

V. CONCLUSION

For the foregoing reasons, the Department asks the Court to reverse and vacate the superior court order with an instruction that the Office of Administrative Hearings vacate its consent order of dismissal and reinstate the administrative proceedings for further proceedings. The Department further asks the Court to deny the Carriers' cross appeal and request for sanctions.

RESPECTFULLY SUBMITTED this 29th day of July 2013.

ROBERT W. FERGUSON
Attorney General

Masako Kanazawa, WSBA # 32703
Assistant Attorney General
Attorneys for Appellant

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uniformly devoid of legal grounds" both in the Court of Appeals and the Supreme Court, including an interlocutory appeal of a trial court order that he pay for additional verbatim report he designated and a motion for "post-trial discovery").

PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 29th day of July 2013, I caused to be served a copy of **Department's Reply and Cross-Response Brief** on the Respondents/Cross Appellants of record on the below stated date as follows:

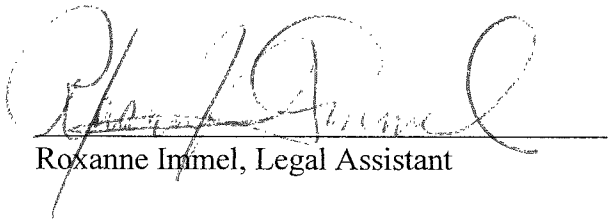
E-mail per parties' agreement

Thomas Fitzpatrick	Tom@tal-fitzlaw.com
Philip Talmadge	Phil@tal-fitzlaw.com
Emmelyn Hart-Biberfeld	emmelyn@tal-fitzlaw.com

E-filed with
Court of Appeals Division II
950 Broadway, Ste 300
Tacoma, WA 98402-4454

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 29th day of July 2013 in Seattle, Washington.



Roxanne Immel, Legal Assistant

Attachments

COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON

EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; KNIGHT TRANSPORTATION, INC., an Arizona corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORT, a Washington corporation, Respondents/ Cross Appellants, v. STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT, Appellant/Cross Respondent.	NO. 44635-9-II DECLARATION OF ASSISTANT ATTORNEY GENERAL MARC WORTHY

I, Marc Worthy, declare under penalty of perjury under the laws of the Washington State that the following is true and correct and based on my personal knowledge.

1. I am over the age of 18 and am otherwise competent to testify.

2. I currently work for the Washington State Attorney General's Office ("AGO") as an Assistant Attorney General in the Consumer Protection Division in Seattle, Washington. I have worked for the AGO since 2001. Before transferring to the Consumer Protection

Division in October 2012, I worked for the Licensing & Administrative Law Division of the AGO. At the Licensing & Administrative Law Division, I, among other things, represented the Employment Security Department ("Department") in unemployment insurance tax cases.

3. During the years 2010, 2011, and 2012, I represented the Department in, among other things, the following eight unemployment insurance tax cases at the Office of Administrative Hearings ("OAH"):

- *System TWT Transport*, OAH Docket No. 01-2010-19566;
- *Gordon Trucking, Inc.*, OAH Docket No. 01-2010-35359;
- *Knight Transportation Services*, OAH Docket No. 01-2010-35358;
- *Haney Truck Line, Inc.*, OAH Docket No. 01-2012-35360;
- *Jasper Trucking, Inc.*, OAH Docket No. 01-2012-01087;
- *Eagle Systems, Inc.*, OAH Docket No. 01-2012-41580;
- *Mike Hawkings Trucking*, LLC, OAH Docket No. 01-2012-41813;
- *PSFL Leasing, Inc.*, OAH Docket No. 01-2012-00283.

The eight companies in those cases were represented by the Talmadge/Fitzpatrick law firm. Those cases were assigned to Administrative Law Judge Todd Gay of OAH in Olympia, Washington.

4. On January 31, 2011, four companies among the above listed eight cases in Paragraph 3 (System-TWT, Gordon Trucking, Haney Truck Line, and Knight Transportation Services) filed a consolidated

summary judgment motion, arguing, among other things, that federal law preempted Washington's Employment Security Act, Title 50 RCW, with respect to the companies' owner-operator drivers. On March 22, 2011, ALJ Gay denied the motion, rejecting the companies' argument and finding genuine issues of material fact about the relationships between the companies and its owner-operator drivers.

5. On April 5, 2011, ALJ Gay issued an order remanding the cases to the Department to reconsider and issue amended audit findings and assessment ("Remand Order").

6. On July 28, 2011, the Department received a *Complaint for Damages under 42 USC. § 1983 and State Law and for Declaratory and Injunctive Relief* ("Federal Complaint") filed in the federal district court against then Department Commissioner Paul Trause and his wife, Department Director of Unemployment Insurance Tax Audit and Collections Bill Ward and his wife, Department Legislative & Legal Process Manager of Unemployment Insurance Tax and Wage Lael Byington and his wife, and Department auditor Joy Stewart. The Federal Complaint was filed by Plaintiffs Washington Trucking Association along with six of the Carriers in this case (Knight Transportation, Eagle Systems, Gordon Trucking,

Haney Truck Line, PSFL Leasing, and System-TWT), all represented by the Talmadge/Fitzpatrick law firm. I represented each of the Department's individual defendants in this federal action.

7. On February 21, 2012, Judge Ricardo Martinez of the federal district court granted the Department defendant's motion to dismiss the Federal Complaint. This order was never appealed.

8. After the federal action, the Department and the eight trucking companies at the OAH proceedings listed in Paragraph 3 above engaged in settlement negotiations. I represented the Department during those negotiations. During the settlement negotiations, ALJ Gay continued the OAH proceedings at the parties' joint request.

9. I acted in good faith in engaging in the settlement negotiations with the Carriers' attorneys in the eight OAH cases listed in Paragraph 3 above. I never engaged in any dilatory conduct.

10. During my settlement negotiations with the Carriers' attorneys, the Carriers claimed exemptions to the unemployment insurance tax under several theories and provided incomplete information to support their claims.

11. To the best of my knowledge, during my representation of the Department, there was never a settlement agreement reached in any of the eight OAH cases listed in Paragraph 3 above.

12. I have read the *Motion to Stay* filed by the Department, the *Answer Opposing Motion to Stay* filed by the Carriers, and the *Reply in Support of Motion to Stay* filed by the Department in this case.

13. I have read the *Motion for Accelerated Review* filed by the Department and the *Memorandum in Opposition to ESD's Motion for Accelerated Review* filed by the Carriers in this case.

14. I have read the *Motion to Modify* filed by the Department and the *Memorandum in Opposition to ESD's Motion to Modify* filed by the Carriers in this case.

15. The factual statements in the Department's *Motion to Stay* (Pages 1 through 6) and *Motion to Modify* (Pages 3 through 10) accurately describe the events in the OAH proceedings.

16. I do not agree with the Carriers' assertion in its *Memorandum in Opposition to ESD's Motion for Accelerated Review* "That the assessments were defective is made clear by the fact that the ALJ forced ESD to reconsider its original assessments on the Carriers, reducing them by more than 70% from the original assessments" (page 3, footnote 3). Similarly, I disagree with the Carrier's assertion in its *Memorandum in Opposition to ESD's Motion to Modify* that "the audits were defective . . . resulting in over a 70% reduction in the original assessments" (page 4). The ALJ never

forced the Department to reduce the assessments. Rather, in the interests of moving the litigation forward, the Department accepted reduced assessments. The reduced assessments were proposed by the Carriers and accepted by the Department only to expedite resolution of the cases.

17. In their *Answer Opposing Motion to Stay*, the Carriers state ALJ Gay found "fundamental flaws" in the audits (page 4). This is untrue. This statement has been the Carriers' claim, not a fact agreed by the Department or found by the ALJ. When the ALJ remanded these cases, he urged both parties to work together to provide complete information, which I took seriously and did to the best of my ability.

18. I do not agree with the Carriers' statement in its *Answer Opposing Motion to Stay* that the Department "made only perfunctory efforts to comply with the ALJ's remand order, even though the Carriers provided it documentation to complete its tasks" (page 5). ALJ Gay ruled in his March 2011 remand order that the Carriers had the burden of providing with the Department evidence of (1) corporate status, if any, of any of their owner operator drivers, (2) situs of service of each owner operator driver who the Carriers claim performed no Washington work, and (3) information for fair

apportionment of payment attributable to driving or other personal services. The "documentation" provided by the Carriers was often infused with a legal argument seeking concession from the Department as part of the ongoing settlement negotiation. The Carriers did not provide complete documentation after the ALJ's remand order. The Department often found the Carriers' documentation incomplete requiring further extensive in-depth research on the part of the Department, for example, as to the corporate status of the owner operator drivers and the situs of their work. As for the situs, the Carriers never provided sufficient evidentiary information, beyond their claims, for the Department to exempt work on that basis outside settlement purposes.

19. In their *Answer Opposing Motion to Stay*, the Carriers state there were "numerous errors in the revised assessments" (Page 5). This is again untrue. Any "revised assessment" was based on the information or lack thereof provided by the Carriers as well as on the Department's concessions made mostly for ongoing settlement purposes.

20. I do not agree with the Carriers' assertion at pages 2-3 of the Carriers' *Answer Opposing Motion to Stay* that the Department's "misconduct, delay, and obfuscation have delayed the resolution of

these cases for nearly three years." Similarly, I do not agree with the Carriers' assertion on page 3 of its *Memorandum in Opposition to ESD's Motion for Accelerated Review* that the Department has engaged in a "campaign of stalling and preventing resolution of its assessments on the Carriers in the courts." These cases have languished at OAH due in part to the federal lawsuit filed by six of the Carriers against various Department employees in July 2011 based on the same audits and assessments at issue in the OAH proceedings. After the lawsuit, the parties voluntarily engaged in settlement negotiations. At no time during my representation of the Department in the OAH proceedings involving the Carriers did ALJ Gay find any dilatory or other misconduct on my or the Department's part. There was no such conduct.

21. I do not agree with the Carriers' assertion in its *Memorandum in Opposition to ESD's Motion for Accelerated Review* (page 3), and in its *Memorandum in Opposition to ESD's Motion to Modify* that the Department's assessments were "illegitimate" and "rigged" (pages 3-4) Those are the Carrier's false, unproven claims, disputed by the Department, and are not based on any finding or suggestion made by any fact finder in any case, including ALJ Gay in the eight OAH cases listed in Paragraph 3 above.

DATED this 30 day of May 2013, at Seattle, King County, Washington.

Marc Worthy

Marc Worthy, WSBA #29750
Assistant Attorney General

COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON

EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; KNIGHT TRANSPORTATION, INC., an Arizona corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORT, a Washington corporation, Respondents/ Cross Appellant, v. STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT, Appellant/Cross Respondent.	NO. 44635-9-II DECLARATION OF ASSISTANT ATTORNEY GENERAL ELIZABETH LAGERBERG

I, Elizabeth Lagerberg, declare under penalty of perjury under the laws of the Washington State that the following is true and correct and based on my personal knowledge.

1. I am over the age of 18 and am otherwise competent to testify.

2. I currently work for the Washington State Attorney General's Office ("AGO") as an Assistant Attorney General ("AAG") in the Licensing and Administrative Law Division in Olympia, Washington. I have worked for the AGO since 2004. At the

Licensing & Administrative Law Division, I represent the Employment Security Department ("Department") in unemployment insurance tax cases.

3. I represented the Department in the following eight unemployment insurance tax cases before the Office of Administrative Hearings ("OAH") in Olympia, Washington:

- *System TWT Transport*, OAH Docket No. 01-2010-19566;
- *Gordon Trucking, Inc.*, OAH Docket No. 01-2010-35359;
- *Knight Transportation Services*, OAH Docket No. 01-2010-35358;
- *Haney Truck Line, Inc.*, OAH Docket No. 01-2012-35360;
- *Jasper Trucking, Inc.*, OAH Docket No. 01-2012-01087;
- *Eagle Systems, Inc.*, OAH Docket No. 01-2012-41580;
- *Mike Hawkings Trucking*, LLC, OAH Docket No. 01-2012-41813;
- *PSFL Leasing, Inc.*, OAH Docket No. 01-2012-00283.

4. The other AAGs who represented the Department in these matters since November 2012 were Masako Kanazawa and Leah Harris.

5. The eight companies in these cases were represented by Phil Talmadge, Tom Fitzpatrick and Emmelyn Hart of the Talmadge/Fitzpatrick law firm.

6. These cases were presided over by Administrative Law Judge ("ALJ") Todd Gay of OAH in Olympia, Washington.

7. The parties in the eight OAH cases listed in Paragraph 3 above engaged in settlement negotiations. However, except for the *Mike Hawkings Trucking* and *Knight Transportation* cases, the parties have never reached a settlement acceptable to both parties. The parties settled the *Mike Hawkings Trucking* and *Knight Transportation* cases in January 2013 and May 2013, respectively, by fully executed settlement agreements signed by both parties. On February 8, 2013, ALJ Gay issued an order dismissing the *Mike Hawkings Trucking* case due to the parties' settlement.

8. On December 18, 2012, during a prehearing conference scheduled for the eight cases listed in Paragraph 3 above, ALJ Gay scheduled the *System TWT Transport* ("System TWT") case for hearing on February 20-21, 2013. The hearings for the other cases were to follow the *System TWT* hearing. Witness and Exhibit Lists and Prehearing Briefs for the *System TWT* case were due and were filed by both parties (the Department and System TWT) on February 6, 2013.

9. On December 18, 2012, System TWT filed a Motion to Enforce Agreement and to Impose Terms with OAH. On January 4, 2013, the Department filed its response to the motion.

10. On January 22, 2013, ALJ Gay issued an Order on Prehearing Motions, denying System TWT's Motion to Enforce Agreement and Impose Terms.

11. AAGs Kanazawa, Harris, and I acted in good faith in engaging in the settlement negotiations with the attorneys at the Talmadge/Fitzpatrick law firm in the eight OAH cases listed in Paragraph 3 above. In fact, AAGs Kanazawa, Harris, and I settled the *Mike Hawkings Trucking* and *Knight Transportation* cases in January and May 2013, respectively, by fully executed settlement agreements signed by both parties.

12. To the best of my knowledge, there was never a settlement agreement reached in any of the eight OAH cases listed in Paragraph 3 above, except for the *Mike Hawkings Trucking* and *Knight Transportation* cases.

13. On January 25, 2013, AAG Kanazawa and I met with the Carriers' attorneys Tom Fitzpatrick and Phil Talmadge to see if the parties could come to any agreement about the pending administrative appeals at the OAH. Also present at this meeting were James Tutton of the Washington Trucking Association and Bill Ward and Nipaporn McMullin of the Department. AAG Kanazawa and I proposed to the Carriers an option where the

parties would submit stipulated facts to ALJ Gay for the ALJ to make a decision, from which the Carriers and the Department could appeal. The Carriers were receptive to this proposal.

14. After January 25, 2013, the three AAGs involved in the administrative proceedings, including me, worked on drafting stipulated facts while preparing for the administrative hearing in the event the stipulation did not work out.

15. On February 14, 2013, the day before the show cause hearing on the Carriers' motion to enforce settlement at the Pierce County Superior Court in this case, the Department and the Carriers reached an agreement on the stipulated facts to be submitted to ALJ Gay in lieu of the hearing scheduled for the *System TWT* case on February 20 and 21, 2013. These stipulated facts were a result of weeks of drafting and negotiations. However, the stipulated facts became moot when the Pierce County Superior Court enforced the disputed settlement agreement and required dismissal of the administrative cases.

16. I have read the *Motion to Stay* filed by the Department, the *Answer Opposing Motion to Stay* filed by the Carriers, and the *Reply in Support of Motion to Stay* filed by the Department.

17. I have read the *Motion for Accelerated Review* filed by the

Department and the *Memorandum in Opposition to ESD's Motion for Accelerated Review* filed by the Carriers in this case.

18. I have read the *Motion to Modify* filed by the Department and the *Memorandum in Opposition to ESD's Motion to Modify* filed by the Carriers in this case.

19. I do not agree with the Carriers' assertions on page 15 of its *Memorandum in Opposition to ESD's Motion to Modify* that "if ESD contends it should have had hearings in which to more fully develop the facts on the legal issues raised by the Carriers, such an argument is specious in light of the fact that it stipulated to having the System case adjudicated essentially on the existing summary judgment record." The Department did not propose to have the matter adjudicated on the summary judgment record alone but proposed that ALJ Gay enter findings and conclusions on the stipulated facts, so that there would be sufficient factual basis for further judicial review.

20. On page 9 of the Carriers' *Answer Opposing Motion to Stay*, in the first paragraph, the Carriers suggest the Department delayed and attempted to "include in the order dismissing the appeals terms not contained in Judge Rumbaugh's order." This is

untrue. Pursuant to Judge Rumbaugh's order on appeal in this case, the Department timely filed its objection to the Carriers' proposed consent order within five judicial days of the Carriers' proposed order. The Department's objection was based on its assessment as to what should be included in the consent order in light of and in accordance with Judge Rumbaugh's order.

21. Before filing the objection to the Carriers' proposed consent order, there were informal email communications between the Carriers' attorneys and the three AAGs as to the Carriers' proposed consent order. At the Carriers' request, the AAGs provided their initial thoughts about the carriers' proposed order, including one that the legal issues the Carriers seek in judicial review should be clearly specified as the preemption issues decided against the Carriers by ALJ Gay. This was based on the three AAGs' understanding that the Carriers were interested in pursuing only the federal preemption issues on judicial review. Tom Fitzpatrick responded on this point, by saying the following:

> The language of the offer was "Your clients are then free to pursue whatever legal issues they want in superior court." In paragraph 3 of Judge Rumbaugh's

> findings of fact he specifically found "ESD would allow the Carriers to pursue whatever legal issues they want in the courts." The Superior Court's order and decree is that the OAH order is to be entered "pursuant to the agreement of the parties as found by this Court." But it [sic] light of what you are obviously trying to pull here, and so that the order is absolutely consistent with Judge Rumbaugh's order, I have revised the order's language (which now appears in section 7 since I added a new section dealing with payment) so it now reads: "Nothing herein precludes the parties from pursuing whatever legal issues they want in the courts." If you persist in trying to insert in the OAH order language contradicting the agreement as found by Judge Rumbaugh, we will bring your efforts to the attention of Judge Rumbaugh seeking sanctions and an order of contempt. You should carefully consider whether you want to continue your efforts to undermine the agreement found by the Superior Court.

22. The Carriers state on page 8 of their *Answer Opposing Motion to Stay* that on February 6, 2013, the Department for the first time disclosed its witnesses. However, the Department disclosed its witnesses in accordance with the deadline for exchanging the witness list pursuant to ALJ Gay's litigation order, and to the extent the list contained witnesses not provided in its prior discovery response, the Department simultaneously provided a supplemental discovery response to the Carriers.

23. The Carriers state on page 8 of their *Answer Opposing Motion to Stay* that the Department made no adjustment for situs in the

System TWT case with a "false claim that the information provided by System was inaccurate." This is untrue. The Department made no exemption adjustment for situs in the *System TWT* case because the Carriers produced no reliable and independent evidence to support such adjustment. The Carriers simply provided a list of employees who allegedly drove no miles in Washington without evidence to support the list, and the list contained a number of wage inconsistencies calling into question the validity of the document's contents.

24. I do not agree with the Carriers' assertion at pages 2-3 of *Answer Opposing Motion to Stay* that the Department's "misconduct, delay, and obfuscation have delayed the resolution of these cases for nearly three years." Similarly, I do not agree with the Carriers' assertion on page 3 of its *Memorandum in Opposition to ESD's Motion for Accelerated Review* that the Department has engaged in a "campaign of stalling and preventing resolution of its assessments on the carriers in the Courts." At no time during my representation of the Department in the OAH proceedings involving the Carriers did ALJ Gay find any dilatory or other misconduct on the part of the Department or any of the three AAGs. There was none.

DATED this 31st day of May 2013, at Olympia, Thurston County, Washington.

Elizabeth Lagerberg, WSBA #25159
Assistant Attorney General

WASHINGTON STATE ATTORNEY GENERAL

July 29, 2013 - 2:20 PM

Transmittal Letter

Document Uploaded: 446359-DeptReplyCrossRespBf_Eagle.pdf

Case Name: Eagle Systems, Inc. et al. v. State of Washington Employment Security Department

Court of Appeals Case Number: 44635-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Department's Reply and Cross-Response Brief

Comments:

No Comments were entered.

Sender Name: Roxanne Immel - Email: **roxannei@atg.wa.gov**